No. 41990-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joel Wilson,

Appellant.

Clallam County Superior Court Cause No. 09-1-00331-8

The Honorable Judge Ken Williams

Appellant's Opening Brief

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22. The trial court violated Mr. Wilson's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22.

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Novel scientific evidence is inadmissible unless it meets the *Frye* test. Here, Dr. Sugar opined (over defense objection) that notches in A.H.'s vagina were consistent with vaginal penetration, without a showing that the underlying theory and methodology were generally accepted in the scientific community. Did the trial court err by admitting novel scientific evidence without a proper foundation?

2. The *Frye* test requires general acceptance (1) of the underlying scientific principle and (2) of the method followed by the expert whose results are the subject of testimony. Here, Dr. Sugar opined (over defense objection) that there was a 60-85% probability that A.H. had been vaginally penetrated, without any foundation establishing that calculation of such a probability was generally accepted in the scientific community. Did the trial court err by allowing the state to introduce testimony without any foundation establishing its admissibility?

3. A "nearly explicit" opinion on the accused person's guilt violates an accused person's constitutional right to a jury trial. In this case Dr. Sugar was permitted to testify to her opinion that it was 60-85% likely that A.H. had been vaginally penetrated. Did the opinion testimony invade the province of the jury and violate Mr. Wilson's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?

4. A prosecutor commits misconduct when s/he suggests that information not presented at trial supports conviction. In this case, the prosecutor stated as fact, in the jury's presence, that "sexual issues" were a significant cause in the breakup of Mr. Wilson's first marriage. Did the prosecutor commit misconduct that violated Mr. Wilson's constitutional rights to due process, to confrontation, and to a jury trial?

5. A prosecutor may not ask questions suggesting that information not presented at trial supports conviction. In this case, the prosecutor asked questions implying that Mr. Wilson's first marriage broke up because he refused to have sex with his wife, but failed to offer or introduce rebuttal testimony proving this allegation. Did the prosecutor commit misconduct that violated Mr. Wilson's constitutional rights to due process, to confrontation, and to a jury trial?

6. It is misconduct for a prosecutor to shift the burden of proof during closing argument. In this case, the prosecutor improperly argued that Mr. Wilson should have presented evidence to corroborate his testimony that he became impotent following an accident. Did the prosecutor commit misconduct that infringed Mr. Wilson's Fourteenth Amendment right to due process?

7. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, evidence was available to show that A.H. had previously been molested by another person. Was Mr. Wilson denied his right to the effective assistance of counsel by his attorney's unreasonable failure to introduce evidence showing that A.H. had previously been molested by another person?

8. A charging document may not be amended mid-trial if the defendant's substantial rights would be prejudiced. In this case, the trial court allowed the prosecutor to amend the Information late in the trial, and the amendment compromised Mr. Wilson's defense. Did the late amendment of the

Information violate Mr. Wilson's right to notice under the Sixth and Fourteenth Amendments and Article I, Section 22?

9. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge allowed two jurors to be dismissed by the bailiff in a back room, based on unsworn answers to the bailiff's questions. Did the trial judge violate the constitutional requirement that criminal trials be open and public by allowing jurors to be dismissed by a bailiff in a back room without first conducting any portion of a *Bone-Club* analysis?

10. An accused person has the constitutional right to be present at all critical stages of trial, including jury selection. In this case, the court allowed a bailiff the discretion to dismiss prospective jurors outside Mr. Wilson's presence, based on their unsworn answers to the bailiff's questions. Did the trial judge violate Mr. Wilson's right to be present under the Sixth and Fourteenth Amendments and under Wash. Const. Article I, Section 22?

11. A jury need not deliberate to unanimity to reject a sentencing enhancement. In this case, the court's instructions erroneously instructed jurors that "all twelve of you must agree on the answer to the special verdict." Did the erroneous instructions violate Mr. Wilson's Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Brandi Main[1] and Joel Wilson had a romantic relationship and lived together for roughly 3 years. RP (2/15/11) 90; RP (2/16/11) 15. Ms. Main's three children also lived with them, as did Mr. Wilson's brother. RP (2/16/11) 15, 114. They broke up in 2007. RP (2/16/11) 15-18, 25.

Main became embroiled in a custody battle with Raymond Hall, the father of her middle child, A.H. RP (2/15/11) 68, 88-91, 133. In June of 2008, while A.H. was visiting Hall and his girlfriend Sarah Esperance, Hall questioned A.H. about her mother's boyfriends as he worked on paperwork regarding the custody case. RP (2/15/11) 88, 93. A.H. then told Esperance that Mr. Wilson had molested her. RP (2/15/11) 93-96.

The state charged Joel Wilson with thirteen counts of Rape of a Child in the First Degree, and alleged that each offense was part of an ongoing pattern of sexual abuse against the same victim. CP 25-33.

On the morning of trial, the prosecutor noted that one potential juror had apparently been convicted of a felony. The judge directed the bailiff to inquire further. RP (2/14/11) 6-7. After ruling on several motions, the judge announced that the bailiff had excused a different person—not the one named by the prosecutor—who had been convicted of

[1] She was also referred to as Brandi Hall during the trial. RP (2/15/11) 27, 85.

a felony. Judge Williams then corrected himself, stating that he, and not the bailiff, had excused the person. RP (2/14/11) 23. The bailiff added that the prospective juror was also very ill, and said "I excused him." RP (2/14/11) 23-25. Another prospective was also apparently excused because of illness. RP (2/14/11) 26. There is no indication that the prospective juror was placed under oath prior to being questioned by the bailiff. *See* RP (2/14/11) *generally*. The court declined Mr. Wilson's request to bring the juror into court to make a record, stating that "We have a policy in place that does allow them to be excused frankly prior to trial beginning. In this case that may or may not have occurred." RP (2/14/11) 27.

Mr. Wilson denied the allegations, both to the police during an interview and during his testimony at trial. RP (2/15/11) 104-141; RP (2/17/11) 7-35. Mr. Wilson's statement to the police was taken by Port Angeles Police Detective Jason Viada at the police station. Viada did not record the statement.[2] Instead, he provided a summary to the jury, based on notes that he had destroyed after preparing a report. Viada told the jury that Mr. Wilson denied any sexual contact with A.H. RP (2/15/11) 108,

[2] Apparently, to save money, the sheriff's department was only recording statements that they considered "confessions." RP (2/15/11) 106. T hey did not ask Mr. Wilson to provide a recorded statement. RP (2/15/11) 140.

124. However, he claimed that Mr. Wilson acknowledged that something may have happened, but that he did not remember. Mr. Wilson testified that he had consistently denied the allegations during the interview. RP (2/15/11) 108; RP (2/17/11) 14-19. Both agreed that he'd said A.H. could have been abused by someone else. RP (2/15/11) 109, 133.

The jury heard Viada's summary of Mr. Wilson's statement, including Mr. Wilson's comment that A.H. may have been sexually abused by someone else. RP (2/15/11) 109. In fact, A.H. had been molested earlier by a neighbor child named Sara Wilson (no relation to Mr. Wilson). Prior to trial, the prosecutor moved *in limine* to prevent Mr. Wilson from introducing evidence of this prior molestation. Plaintiff's Motions in Limine, Supp. CP. The court reserved ruling, but required the issue to be raised outside the jury's presence. During trial, defense counsel did not offer any evidence regarding this prior sexual abuse. RP (2/14/11) 8-10; See RP, *generally*.

Mr. Wilson testified and denied any sexual contact with A.H. RP (2/17/11) 7-29. He explained that a 2005 work injury had rendered him impotent. RP (2/17/11) 9, 23. During cross examination, the prosecutor asked:

> Q. Isn't it true that your first marriage ended because you weren't having sex with your wife?
> A. No.

> Q. Okay. Isn't it true that after the birth of her child that you only had sex about twice in your first marriage?
> RP (2/17/11) 29-30.

Defense counsel objected, and the prosecutor responded (in front of the jury):

> MS. LUNDWALL: I think actually it is and if his testimony is it was only because his back injury that the sexual issues arose, it's pretty well that was a significant cause in the break up of his first marriage. I think it's fair game at this point.
> RP (2/17/11) 30.

The objection was overruled. RP (2/17/11) 30.

The case centered on expert testimony interpreting the video of A.H.'s physical examination. In particular, two experts discussed whether there were notches or folds on A.H.'s hymen, and what those notches or folds may have signified. Nurse Margaret Jahn, of Harborview Sexual Assault Center, conducted A.H.'s exam and made the video that was later reviewed by others. In her report, Nurse Jahn concluded that A.H.'s hymen exhibited folds rather than notches, and that the exam was therefore normal. RP (2/15/11) 165, 177-178.

But the prosecutor did not call Jahn to testify. Instead, the state offered the testimony of Dr. Sugar, also from the Harborview Sexual Assault Center. RP (2/15/11) 144-193. Dr. Sugar, who was not present for the examination, reviewed the recording of A.H.'s examination. She explained to the jury that the hymen is stretchy, especially that of a girl

going through puberty as A.H. was when her exam was recorded. RP (2/15/11) 149-153. According to Dr. Sugar, A.H. had either deep notches or folds in the posterior half of her hymen. RP (2/15/11) 157-158, 165. She testified that one expert in the field believed that deep posterior notches are more likely to be present if the examinee has had intercourse, but that "there's always disputed [sic] by experts." RP (2/15/11) 151-156. She acknowledged that the only way to tell the difference between a deep notch (which one article noted may indicate sexual activity) and a fold (which all agree is normal and not indicative of anything) is to use a cotton swab or water to move the area and look. This was not done in A.H.'s exam. RP (2/15/11) 165-169, 179.

Dr. Sugar was asked if she had "an opinion to a reasonable degree of medical certainty whether the findings [she] observed are consistent with a history of repeated vaginal penetration since age 7?" Mr. Wilson objected, and the jury was excused.[3] RP (2/15/11) 159.

Outside the jury's presence, Dr. Sugar acknowledged that even a finding that something was "most consistent" with a particular conclusion was insufficient for a diagnosis. RP (2/15/11) 160-162. She agreed that it was not possible—without the additional manipulation of the tissue—to be

[3] Mr. Wilson repeatedly asked the court to exclude any such opinion. RP (2/14/11) 12-14, RP (2/15/11) 159-171.

certain that A.H. had deep notches (rather than folds) in her hymen. RP (2/15/11) 164. Dr. Sugar also admitted that experts disagreed on how to measure whether a notch is "deep" or not. RP (2/15/11) 169.

Mr. Wilson argued that Dr. Sugar's opinion was inadmissible because it did not satisfy the *Frye* test. RP (2/15/11) 170. The court overruled the objection, and Dr. Sugar was permitted to testify that in her opinion, the findings were consistent with a history of repeated vaginal penetration since the age of seven, to a reasonable degree of medical certainty.[4] RP (2/15/11) 171-172. The prosecutor asked her to express her opinion in terms of a number. Dr. Sugar expressed some discomfort at the idea, but ultimately testified that it was "60 to 85% likely" that the notches were from past penetration. RP (2/15/11) 192. No additional foundation was provided for this testimony.

The defense countered with the testimony of Dr. Griest, a forensic pediatric pathologist, who also reviewed the examination video. RP (2/16/11) 63. She explained that the meaning of deep notches in the hymen was very controversial among experts. She noted that the range of normal variation is broad and that even deep posterior notches are considered indeterminate. RP (2/16/11) 69-71. She also noted—as Dr.

[4] She also offered her medical opinion that no notches at all in the exam was consistent with repeated vaginal penetration since the age of 7. RP (2/15/11) 187-188.

Sugar had—that experts disagreed on how the depth of a notch was to be assessed. RP (2/16/11) 169. She testified that it was unclear whether A.H. even had deep notches, since the area was not unfolded or otherwise manipulated during the examination. RP (2/16/11) 71-73.

Partway into the third day of trial, the prosecutor noted her intent to amend three of the charges against Mr. Wilson from penetration with a vibrator to penetration with a penis. RP (2/16/11) 36-38. The court allowed this amendment over defense objection. RP (2/16/11) 37-38, 59.

The court's instruction regarding the special verdicts included the following language:

> Because this is a criminal case, all twelve of you must agree in order to answer the Special Verdict Form. In order to answer the Special Verdict From "Yes," you must unanimously be satisfied beyond a reasonable doubt that "Yes" is the correct answer. If any of you have a reasonable doubt as to this question, you must answer "No".
> Instruction No. 27, Court's Instructions, Supp. CP.

During her rebuttal closing argument, the prosecutor argued:

> First thing I'd like to take issue with the term impossible to have sex, we know from the testimony in 2005 after his back injury he stopped having sex, he didn't have any medical opinion saying that.
> RP (2/17/11) 76-77.

A defense objection was overruled, and she continued by arguing "There has been no science showing that this man over there is incapable or it is

impossible for him to have sexual intercourse..." RP (2/17/11) 76-77. Defense counsel again objected, and the jury was excused. Following brief argument, the jury was reminded of the state's burden of proof, and the prosecutor completed her argument. RP (2/17/11) 80-87.

The jury convicted Mr. Wilson of all thirteen counts. CP 6-24. After sentencing, Mr. Wilson timely appealed. CP 5.

ARGUMENT

I. THE TRIAL COURT SHOULD HAVE EXCLUDED DR. SUGAR'S TESTIMONY THAT A.H. HAD LIKELY BEEN VAGINALLY PENETRATED.

A. Standard of Review

Review of a trial court's decision to admit scientific evidence is *de novo*, and the appellate court "may undertake a searching review of scientific literature as well as secondary legal authority before rendering a decision." *State v. Sipin*, 130 Wash. App. 403, 414, 123 P.3d 862 (2005).

A. Dr. Sugar's testimony was inadmissible because it did not meet the *Frye* test.

In Washington, novel scientific evidence is evaluated using the *Frye* test. *Sipin, at* 413 (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). Under *Frye,* such evidence is inadmissible unless (1) it is based on a scientific principle that is generally accepted in the relevant

scientific community, (2) there are generally accepted methods of applying the principle to produce reliable results, and (3) the accepted method was properly applied in the case before the court. *Sipin, at* 414. If there is a significant dispute among qualified experts, scientific evidence is inadmissible.[5] *Sipin, at* 414.

In this case, the trial court should have sustained Mr. Wilson's objection under *Frye*. Dr. Sugar acknowledged some dispute within the field regarding the notch theory. RP (2/15/11) 154-155. She also acknowledged that there is no generally accepted method of applying the notch theory, because experts disagree on how notch measurements should be taken. RP (2/15/11) 177. Both of these points were confirmed by the defense expert. Dr. Giest testified that there was no agreement among experts as to how to take notch measurements. Dr. Giest also testified that experts disagreed about the conclusions to be drawn from notch measurements.[6] RP (2/16/11) 60-86.

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[5] Furthermore, a trial court's decision under *Frye* cannot be sustained "on a mere finding that the record contains sufficient evidence of the reliability of the challenged scientific method." *Id.* In other words, the result of a highly reliable test may not be admitted into evidence absent general acceptance in the scientific community. *Id.*

[6] The problems outlined by Drs. Sugar and Giest might have been resolved by testimony that these disputes were not "significant." *Sipin, at* 414. But no testimony was introduced on this point; indeed, the testimony suggests that the theory was the subject of ongoing debate. Accordingly, the prosecution failed to lay the foundation for admission of testimony that the exam was consistent with vaginal penetration. *Id.*

Because the notch theory was not generally accepted, Dr. Sugar should not have been permitted testify about it. *Sipin, at* 414. Nor should she have been allowed to tell jurors that her review of the video suggested the presence of notches consistent with vaginal penetration. *Sipin, at* 414.

Even if the notch theory itself were generally accepted, Dr. Sugar's testimony went well beyond the basic (disputed) methodology. Neither party presented evidence suggesting general acceptance of any method of calculating a percentage describing the likelihood of vaginal penetration. RP (2/15/11) 147-193. Indeed, Dr. Sugar herself was reluctant to provide a number, and did so (over defense objection) only at the request of the prosecuting attorney. RP (2/15/11) 193. Nothing in the record suggested general acceptance within the scientific community that such a percentage could be derived from review of video of an examination. *See* RP, *generally*. Accordingly, Dr. Sugar's testimony that there was a 60-85% likelihood that A.H. had been vaginally penetrated should not have been admitted. *Sipin, at* 414.

Mr. Wilson's conviction must be reversed and the case remanded to the trial court for a new trial, with instructions to exclude Dr. Sugar's testimony, unless the prosecution is able to lay a proper foundation. *Sipin, at* 414.

II. MR. WILSON'S CONVICTION WAS OBTAINED IN VIOLATION OF HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 21 AND 22 OF THE WASHINGTON CONSTITUTION.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler,* 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

B. Mr. Wilson's convictions violated his constitutional right to a jury trial because they were based in part on impermissible opinion testimony.

Under Article I, Section 21 of the Washington Constitution, "The right of trial by jury shall remain inviolate..." Wash. Const. Article I, Section 21. Article I, Section 22 provides that "the accused shall have the right . . . to have a speedy public trial by an impartial jury." Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Impermissible opinion testimony on the accused person's guilt violates the constitutional right to a jury trial. *State v. Kirkman*, 159 Wash.2d 918, 155 P.3d 125 (2007); *State v. Black*, 109 Wash.2d 336, 745 P.2d 12 (1987). Opinion testimony on an ultimate issue is forbidden if it

is a "nearly explicit" or "almost explicit" statement by the witness that the witness believes the accused is guilty. *Kirkman, at* 937.

In this case, Dr. Sugar violated Mr. Wilson's jury trial right when she opined, over defense objection, that there was a 60-85% likelihood that A.H. had been vaginally penetrated, based on the "notch" theory. RP (2/15/11) 169-171, 192. In context, this amounted to a "nearly explicit" or "almost explicit" statement that she believed Mr. Wilson was guilty. *Kirkman, at* 937. A.H. denied having consensual sex with anyone, and the jury did not hear evidence that she had been abused by anyone other than Mr. Wilson.[7] See RP, *generally*. The only conclusion to be drawn from Dr. Sugar's testimony was that Mr. Wilson had raped A.H.

C. Mr. Wilson was prejudiced by the violation of his jury trial right.

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Irby,* 170 Wash.2d 874, 886, 246 P.3d 796 (2011); *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang, at* 32.

[7] The record suggests that A.H. had previously been abused by another person. RP (2/14/11) 8-9. However, this evidence was not introduced at trial. See RP, *generally*.

Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke,* 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Irby, at* 886. Dr. Sugar's opinion testimony provided the only evidence corroborating A.H.'s allegations against Mr. Wilson. Furthermore, by providing an objective number (60-85%), Dr. Sugar imbued her testimony with an unearned aura of scientific or mathematical certainty.

On the other side of the scale, two experts concluded that there were no vaginal notches. RP (2/15/11) 165, RP (2/16/11) 60-86. Additionally, numerous witnesses testified that they saw no signs of abuse. RP (2/16/11) 22-29, 44-48, 92-122. Furthermore, Mr. Wilson consistently denied that he had abused A.H. RP (2/15/11) 106, 108, 109; RP (2/17/11) 28. Finally, A.H. delayed reporting the offense for years. RP (2/15/11) 88, 93; RP (2/16/11)15-18, 25.

Under these circumstances, the error cannot be described as trivial, formal, or merely academic; nor can Respondent prove that it did not prejudice [Mr. Wilson], and that it in no way affected the final outcome of

the case. *Lorang, at* 32. A rational juror could have entertained a reasonable doubt about Mr. Wilson's guilt. Because the error was not harmless, the conviction must be reversed and the case remanded for a new trial. *Id.*

III. THE PROSECUTOR COMMITTED MISCONDUCT INFRINGING MR. WILSON'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, TO CONFRONTATION, AND TO A JURY TRIAL.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *Schaler, at* 282. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.[8] *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). The burden is on the state to show harmlessness beyond a reasonable doubt. *Irby, supra.*

B. A prosecutor may not provide unsworn "testimony" by stating as fact information not presented to the jury, or by asking questions that suggest information not presented at trial supports conviction.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amend VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most crucial aspect of

[8] Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash. App. 794, 800, 998 P.2d 907 (2000).

confrontation is the right to conduct meaningful cross-examination. *State v. Foster,* 135 Wash.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). The purpose of cross-examination

> ...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.

State v. Darden, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citations omitted).

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

Convictions must be based on evidence, not innuendo. *State v. Miles,* 139 Wash.App. 879, 886, 162 P.3d 1169 (2007). A prosecutor commits misconduct, infringes the due process right to a fair trial, and violates an accused person's confrontation and jury trial rights, whenever s/he impeaches a witness by referring to extrinsic evidence that is never introduced at trial. *Id.* A prosecutor may not use impeachment as a means

of submitting to the jury evidence that is otherwise unavailable. *Id.* A prosecutor who asks questions implying the existence of a prejudicial fact must be prepared to prove that fact. *Id.* Even questions that properly lay the foundation for impeachment during rebuttal can violate the accused person's constitutional rights if the impeachment is never proved during rebuttal. *Id.*

A prosecutor also commits misconduct by suggesting that information not presented at trial supports conviction. *State v. Jones*, 144 Wash.App. 284, 293-94, 183 P.3d 307 (2008) ("*Jones* I"); *State v. Perez-Mejia*, 134 Wash.App. 907, 916, 143 P.3d 838 (2006).

C. The prosecutor committed prejudicial misconduct by stating "facts" that were never introduced into evidence and by asking questions that suggested information not introduced at trial supported conviction.

Here, the prosecutor announced in the jury's presence that "sexual issues" were "a significant cause in the breakup of [Mr. Wilson's] first marriage." RP (2/17/11) 30. She was also permitted to ask Mr. Wilson (over objection) two questions relating to his first marriage:

> Q. Isn't it true that your first marriage ended because you weren't having sex with your wife?
> A. No.
> Q. Okay. Isn't it true that after the birth of her child that you only had sex about twice in your first marriage?
> RP (2/17/11) 29-30.

The prosecutor's announcement—that "sexual issues" were "a significant cause in the breakup of his first marriage"—was egregious misconduct. RP (2/17/11) 30. It implied to the jury that Mr. Wilson had difficulty in his sexual relationships with adult women, and therefore might be inclined to rape and molest children. The prosecutor was not under oath when she made this claim; nor was she subject to confrontation.

Her two questions on the subject of his first marriage were also improper. Even if the questions addressed relevant facts, they nonetheless violated Mr. Wilson's confrontation and due process rights because of the state's failure to introduce rebuttal testimony proving the alleged "facts." *Miles, at* 886-889. Specifically, the state never offered or introduced extrinsic evidence showing Mr. Wilson's alleged refusal to have sex "was a significant cause in the breakup of his first marriage." [9] As in *Miles,* there was "no conceivable purpose for asking these questions without rebuttal witnesses available other than to impart to the jury the prosecutor's knowledge." *Id, at* 888. As in *Miles,* it was not necessarily

[9] The problem was exacerbated by the prosecutor's closing argument in which she highlighted Mr. Wilson's failure to introduce medical testimony confirming his impotence. RP (2/17/11) 76-78. The propriety of this argument is discussed elsewhere in this brief.

the questions themselves that were improper; rather it was the prosecutor's failure to prove her claims in rebuttal.[10] *Id.*

Unlike *Miles,* the prosecutor went beyond asking questions; she made a statement of fact in front of the jury, implying that she had knowledge supporting his guilt other than that introduced at trial. This violated the prohibition against unsworn prosecutorial "testimony." *Jones* I; *Perez-Mejia.*

D. The prosecutor committed misconduct by shifting the burden of proof in closing argument.

A prosecuting attorney commits misconduct by making a closing argument that shifts the burden of proof. *State v. Dixon*, 150 Wash.App. 46, 55, 207 P.3d 459 (2009); *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2006). It is improper even to imply that the defense has a duty to present evidence relating to an element of the charged crime. *Toth, at* 615. Such misconduct affects a constitutional right and requires reversal of the conviction unless the error is harmless beyond a reasonable doubt. *Id.*

In this case, the prosecutor improperly argued that Mr. Wilson bore the burden of producing medical testimony to prove that he was impotent.

[10] In contrast to *Miles,* the prosecutor here went beyond asking questions and announced to the jury that sexual issues were "a significant cause in the breakup of his first marriage." RP (2/17/11) 30. This was rank prosecutorial testimony at its worst.

RP (2/17/11) 76-78. This argument shifted the burden of proof by suggesting that Mr. Wilson was obligated to provide evidence on the subject.[11] *Dixon, at* 55-56. The trial court amplified the prejudice to Mr. Wilson by overruling defense counsel's objections to the comments, implying that Mr. Wilson did, in fact, bear some burden.[12] RP (2/17/11) 77.

The prosecutor's misconduct shifted the burden of proof, and is presumed prejudicial. *Dixon, at* 54; *Toth, at* 615. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

IV. MR. WILSON WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865,

[11] This is not a case in which a missing witness argument would be proper. *See, e.g., Dixon, at* 55-57. There is no indication in the record that Mr. Wilson consulted with a doctor and then declined to call that doctor as a witness. Nor did Mr. Wilson invite the misconduct by suggesting—either during his testimony or in closing—that his doctor would corroborate his testimony. Unlike the prosecution, the defense did not rest its case on "facts" that were never introduced or on unsworn "testimony" that was not subject to cross-examination.

[12] The problem was further exacerbated by the prosecutor's misconduct during cross-examination of Mr. Wilson. At that time, she stated (in front of the jury) that Mr. Wilson's impotence was feigned because "sexual issues" were "a significant cause in the breakup of his first marriage." RP (2/17/11) 30.

16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel…." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach, at* 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert,* 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

C. Mr. Wilson was prejudiced by defense counsel's unreasonable failure to introduce evidence that A.H. had previously been molested.

Evidence that a child has previously been sexually abused by someone other than the accused is relevant and admissible under the proper circumstances. *State v. Carver,* 37 Wash.App. 122, 125, 678 P.2d 842 (1984).[13] For example, such evidence may be relevant and admissible

[13] Such evidence is not subject to exclusion under the rape shield statute. *Carver, at*125.

to show an alternate basis for a young victim's precocious sexual knowledge. *Id, at* 123-125.

In this case, defense counsel should have introduced evidence that A.H. had previously been molested by a neighbor child named Sara Wilson. Plaintiff's Motions In Limine, Supp. CP. The prior molestation took place less than two years prior to the beginning of the charging period. CP 25; Plaintiff's Motions in Limine, Supp. CP. Such evidence was relevant to help explain the early onset of A.H.'s habit of frequent masturbation—a behavior that the prosecutor highlighted in closing. RP (2/17/11) 82-83. It also suggested an explanation for the deep notches that Dr. Sugar claimed to have observed in her review of the video of A.H.'s examination.[14] Finally, if Mr. Wilson were aware of the prior molestation, it would have helped to explain his statement to Viada about abuse by someone other than himself.

Without this evidence, the jury was free to conclude that A.H.'s masturbation was inspired by abuse inflicted by Mr. Wilson—a point made by the prosecutor. Jurors were also left with the impression that Mr. Wilson was the only possible source for the deep notches in A.H.'s hymen. Jurors may also have taken Mr. Wilson's statement (that A.H.

[14] Although the specific allegations against Sara Wilson apparently did not include penetration, it is possible that the reported incident was only one of many.

may have been abused by someone else) as a desperate attempt to redirect blame.

There is a reasonable possibility that testimony about the prior abuse would have changed the outcome of the case. *Reichenbach, at* 130. Had jurors understood that there was an alternate explanation for A.H.'s masturbation and the presence of deep notches, they would have been more inclined to credit Mr. Wilson's denials (and the evidence that A.H. exhibited no discomfort when she spent time with him in the presence of others).

Accordingly, Mr. Wilson was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. The convictions must be reversed and the case remanded for a new trial. *Id.*

V. THE TRIAL COURT VIOLATED MR. WILSON'S CONSTITUTIONAL RIGHT TO NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 22 BY ALLOWING THE PROSECUTOR TO AMEND THE INFORMATION AFTER THE COMMENCEMENT OF TRIAL.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler,* 282.

B. Mr. Wilson was constitutionally entitled to adequate notice of the charges.

The Sixth Amendment to the Federal Constitution guarantees an accused person the right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI.[15] A similar right is secured by the Washington State Constitution. Wash. Const. Article I, Section 22. Under the superior court criminal rules, the trial court "may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." CrR 2.1(d).

In this case, the late amendment of the Information prejudiced Mr. Wilson's substantial rights; his objection to the amendment should have been sustained. Mr. Wilson was prepared to meet the original charges in Counts 1 through 13 by showing that A.H.'s description of the vibrator (which she claimed was blue) did not match the vibrator owned by Main. RP (2/15/11) 48-74; RP (2/16/11) 26-48. His cross examination of the witnesses was geared to this discrepancy. See RP, generally. By highlighting the discrepancy, Mr. Wilson also hoped to cast doubt not just on those charges that involved a vibrator, but also on the remaining

[15] This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

charges. RP (2/15/11) 48-74; RP (2/16/11) 26-48. The problem was exacerbated by the prosecutor's questions implying that Mr. Wilson's marriage ended when he refused to have sex with his wife (a claim both he and she denied) and her argument that he failed to produce medical testimony confirming that he was impotent. RP (2/17/11) 29-30, 76-78.

The trial court should have sustained Mr. Wilson's objection to the late amendment. The 11th hour change deprived him of his constitutional right to notice of the specific facts alleged by the prosecution, and caused substantial prejudice. U.S. Const. Amend. VI, XIV; Wash. Const. Article I, Section 22; CrR 2.1(d).

VI. THE TRIAL COURT VIOLATED BOTH MR. WILSON'S AND THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *Schaler, at* 282. Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge,* 161 Wash.App. 568, ___, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Njonge, at* ___.

B. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club,* 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675, (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club, at* 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club, at* 261-262, 257.[16] In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct., *at* 724-725.

The public trial right ensures that an accused person "is fairly dealt with and not unjustly condemned." *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, "the presence of interested spectators may keep [the accused person's] triers keenly alive to a sense of the responsibility and to the importance of their functions." *Id.* The

[16] *See also State v. Strode,* 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman,* 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode,* 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007). The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely "ministerial." *See, e.g., Strode, at* 230.[17]

C. The trial court violated the public trial requirement by allowing the bailiff to dismiss jurors behind closed doors.

In this case, the trial judge allowed the bailiff to dismiss jurors after speaking with them in a back room. RP (2/14/11) 6-7, 23-27. There is no indication that the prospective jurors were placed under oath, prior to being questioned by the bailiff. This proceeding, conducted outside the public's eye without the required analysis and findings, violated Mr. Wilson's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra.* It also violated public's right to an open trial. *Id.* Accordingly, Mr. Wilson's conviction should be reversed and the case

[17] ("This court, however, 'has never found a public trial right violation to be [trivial or] *de minimis*'") (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

remanded for a new trial. *Id.*

D. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

The Court of Appeals has held that the public trial right only extends to evidentiary hearings. *See, e.g., State v. Sublett,* 156 Wash.App. 160, 181, 231 P.3d 231, *review granted,* 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered.

VII. THE TRIAL JUDGE VIOLATED MR. WILSON'S CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY EXCUSING JURORS IN HIS ABSENCE.

A. Standard of Review

Constitutional violations are reviewed *de novo. Schaler, at* ___.

B. An accused person has a constitutional right to be present at all critical stages of trial.

A criminal defendant has a constitutional right to be present at all critical stages of a criminal proceeding. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Pruitt*, 145 Wash.App. 784, 788, 797-799, 187 P.3d 326 (2008). This right stems from the Sixth Amendment's confrontation clause and from the Fourteenth Amendment's due process clause. *Gagnon, at 526.* Although

the core of this privilege concerns the right to be present during the presentation of evidence, due process also protects an accused person's right to be present "whenever his [or her] presence has a relation, reasonably substantial, to the fulness [sic] of his [or her] opportunity to defend against the charge." *Id.* Accordingly, "the constitutional right to be present at one's own trial exists 'at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure.'" *United States v. Tureseo*, 566 F.3d 77, 83 (2d Cir. 2009) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)).

C. Mr. Wilson's conviction must be reversed because the trial judge violated his Fourteenth Amendment right to be present at all critical stages of trial.

The right to be present encompasses jury selection. This allows the accused person "to give advice or suggestion or even to supersede his lawyers." *Synder v. Massachusetts,* 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934), *overruled in part by Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Furthermore, "[a]s Blackstone points out, 'how necessary it is that a prisoner ... should have a good opinion of his jury the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for his dislike.'"

United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (quoting 4 W. Blackstone, *Commentaries on the Laws of England,* 353 (1765)).

In this case, Mr. Wilson was denied his Fourteenth Amendment right to be present during a critical stage of the proceedings. Prior to the start of trial, the trial judge allowed the bailiff to speak with and excuse jurors outside the defendant's presence.[18] The trial court's decision affected the makeup—and hence the fairness—of the jury that presided over Mr. Wilson's fate. The court's decision to allow the bailiff to excuse jurors in Mr. Wilson's absence violated his Fourteenth Amendment right to be present. *Gordon, supra; Gagnon, supra.* His conviction must be reversed and the case remanded for a new trial. *Id.*

VIII. THE JURY'S "YES" ANSWER TO THE SPECIAL VERDICT VIOLATED MR. WILSON'S JURY TRIAL RIGHT AND HIS RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I SECTIONS 3, 21, AND 22.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *Schaler, at* 282. Jury instructions are reviewed *de novo*. *State v. Bashaw*, 169 Wash.2d 133, 140, 234 P.3d 195 (2010). Instructions must be manifestly clear. *State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

[18] The bailiff's decision to excuse jurors also occurred outside the presence of the judge and counsel.

B. The court's instructions erroneously required jurors to deliberate to unanimity in order to reject the aggravating factor.

The Supreme Court has recently reaffirmed that "a nonunanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt." *Bashaw, at* 148. Accordingly, jurors may not be instructed that unanimity is required in order to return a special verdict. *Id.* Such an instruction "leave[s] the jury without a way to express a reasonable doubt on the part of some jurors." *State v. Ryan*, 160 Wash.App. 944, 947, 252 P.3d 895 (2011). Accordingly, it violates due process and the constitutional right to a jury trial. *Id;* U.S. Const. Amend. VI and XIV; Wash. Const. Article I, Sections 3, 21, and 22.

The instruction is also coercive, in violation of both constitutional rights.[19] *See, e.g, State v. Jones*, 97 Wash.2d 159, 641 P.2d 708 (1982) ("*Jones* II"). By requiring the jury to deliberate to unanimity, the erroneous instruction serves to coerce a verdict—it amounts to an automatic rejection of any split verdict, and an instruction to continue deliberating. Without the instruction, the jury might be inclined to deliver a "no" verdict before they have reached unanimity. With the instruction, a

[19] In *Bashaw* and *Goldberg,* the Supreme Court found it unnecessary to reach the issue of jury coercion. *See Bashaw, at* 146 (citing *State v. Goldberg*, 149 Wash.2d 888, 72 P.3d 1083 (2003)).

legitimate but nonunanimous "no" verdict is mechanically refused, and the jury coerced into returning a unanimous verdict. This violates the due process right to a fair trial and the constitutional right to a jury trial. *Jones* II, *supra.*

Here, as in *Bashaw,* the jury was erroneously instructed that "all twelve of you must agree in order to answer the Special Verdict Form." This part of the instruction was contradicted by the last sentence, which reads "If any of you have a reasonable doubt as to this question, you must answer 'No.'" Instruction No. 27, Supp. CP. Because the instruction is contradictory, and because one portion of it is a clear misstatement of the law, it is presumed to have misled jurors in a manner prejudicial to the defendant. *State v. Walden*, 131 Wash.2d 469, 478, 932 P.2d 1237 (1997).

The "yes" verdict was therefore "[t]he result of [a] flawed deliberative process." *Bashaw, at* 147. Furthermore, the incorrect instruction created a manifest error affecting Mr. Wilson's Fourteenth Amendment right to due process. Accordingly, the issue can be raised for the first time on review pursuant to RAP 2.5(a)(3).[20] *Ryan, at* 950[21]

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[20] Even if the error were not manifest, or did not affect a constitutional right, the court should exercise its discretion and review the argument on its merits. RAP 2.5(a); *State v. Russell,* 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

[21] Division III has decided that *Bashaw* errors cannot be raised for the first time on review. *State v. Nunez,* 160 Wash.App. 150, 248 P.3d 103 (2011); *State v. Bea,* ___ Wash. App. ___, ___ P.3d ___ (2011). This is curious, since the defendant in *Bashaw* did not

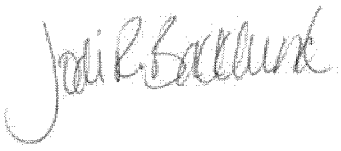
Because of the faulty instructions, it is impossible to "say with any confidence what might have occurred had the jury been properly instructed." *Bashaw, at* 148. The aggravating factor must therefore be vacated and the case remanded for a new sentencing hearing.[22] *Id.*

CONCLUSION

For the foregoing reasons, the convictions must be reversed and the case remanded for a new trial. In the alternative, the aggravating factor found by the jury must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on October 17, 2011.

BACKLUND AND MISTRY



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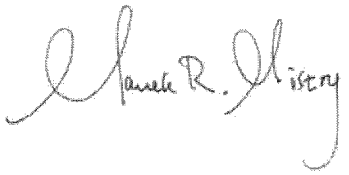
object in the trial court and raised the error for the first time on review, as noted in the Court of Appeals' opinion in that case. *See State v. Bashaw*, 144 Wash.App. 196, 199, 182 P.3d 451 (2008) *reversed by Bashaw, supra* ("There was no objection to the instruction").

[22] Although the judge sentenced Mr. Wilson within the standard range, he might have been inclined to impose a lower sentence within the range in the absence of the jury's finding.



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CERTIFICATE OF SERVICE

I certify that on October 17, 2011:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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I delivered an electronic version of the brief, using the Court's filing portal, to:

Brian Patrick Wendt
Clallam County Prosecuting Attorney
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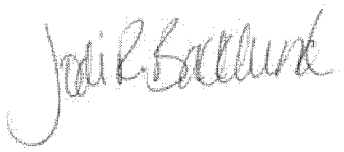
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 17, 2011.



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